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In The
Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER MICHAEL J. BOWERS ATTORNEY GENERAL OF GEORGIA

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TABLE OF CONTENTS

Pages

I. Respondent Misconceives the Test for Determining the Application of the Right of Privacy 1

II. Our Concept of Ordered Liberty Does Not Protect All Intimate Relationships Between Consenting Adults From Government Regulation 7

III. Our Concept of Ordered Liberty Does Not Protect all Activities Which Occur in the Private Home From Government Regulation 14

IV. Conclusion 18

TABLE OF AUTHORITIES

Pages

CASES:

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 10

Carey v. Population Services International, 431 U.S. 678 (1977) 10

Dandridge v. Williams, 397 U.S. 471 (1970) 19

Duncan v. Louisiana, 391 U.S. 145 (1968) 1

Eisenstadt v. Baird, 405 U.S. 438 (1972) 10

Evans v. Abney, 396 U.S. 435 (1970) 19

Griswold v. Connecticut, 381 U.S. 479 (1965) 1, 2, 10, 13, 16, 17

Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985) 1

Katz v. United States, 389 U.S. 347 (1967) 15, 16, 17

Mapp v. Ohio, 367 U.S. 643 (1961) 15

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 2

Oliver v. United States, 466 U.S. 170 (1984) 15

Olmstead v. United States, 227 U.S. 438 (1928) 16

Payton v. New York, 445 U.S. 573 (1980) 3, 4, 5, 14, 15, 16

Poe v. Ullman, 367 U.S. 497 (1961) 13, 19

Roberts v. United States Jaycees, — U.S. —, 104 S.Ct. 3244 (1984) 8, 9

Roe v. Wade, 410 U.S. 113 (1973) 1, 2, 7, 10, 11, 12

Stanley v. Georgia, 394 U.S. 557 (1969) 12, 13, 17, 18

Tennessee v. Garner, — U.S. —, 105 S.Ct. 1694 (1985) 3, 5, 6

United States v. Jacobsen, — U.S. —, 104 S.Ct. 1652 (1984) 15

TABLE OF AUTHORITIES—Continued

	Pages
United States v. Orito, 413 U.S. 139 (1973)	12, 17
United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973)	12, 17
Winston v. Lee, — U.S. —, 105 S.Ct. 1611 (1985)	15
Wisconsin v. Yoder, 406 U.S. 205 (1972)	2
Woodson v. North Carolina, 428 U.S. 208 (1976)	6
Zablocki v. Redhail, 434 U.S. 374 (1978)	13
CONSTITUTIONAL PROVISIONS:	
First Amendment	passim
Fourth Amendment	passim
Fifth Amendment	passim
Fourteenth Amendment	passim

I. RESPONDENT MISCONCEIVES THE TEST FOR DETERMINING APPLICATION OF THE RIGHT OF PRIVACY

We deal here with the right of privacy first announced by the Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965). It is upon *Griswold* and its progeny that the Eleventh Circuit relied in reaching its decision that the Georgia sodomy statute "infringes upon the fundamental constitutional rights of Michael Hardwick." *Hardwick v. Bowers,* 760 F.2d 1202, 1211-12 (11th Cir. 1985) (Cert. Appendix at 22-24).

Only fundamental rights, implicit in the concept of ordered liberty, are protected by this right of privacy. In *Roe v. Wade,* 410 U.S. 113 (1973), the Court said that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152, *quoting Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

As Petitioner has previously argued, in order to decide whether a right is fundamental and implicit in the concept of ordered liberty the history and traditions of our society and its institutions must be examined. In *Duncan v. Louisiana,* 391 U.S. 145 (1968), the Court made it clear that due process analysis requires an examination of *our* history and that inquiry into other systems of ordered liberty or theoretical speculation about what might be fundamental in some abstract system of ordered liberty is not to the point. In *Duncan,* the Court was confronted with the issue of whether the right to trial by

jury in criminal cases should be applied to the states through the Due Process Clause of the Fourteenth Amendment. In deciding whether a particular procedural safeguard is required by due process, the Court said that the question is not whether "a civilized system could be imagined that would not accord the particular protection." *Id.* at 149 n.14. Rather, the Court described the question as whether under *our* system a particular procedure is fundamental: "The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* In many privacy decisions, including *Griswold* itself, the Court has emphasized its obedience to history in deciding whether activities and decisions are protected from government regulation under the right of privacy. *Griswold,* 381 U.S. at 480; *id.* at 493 (Goldberg, J., concurring); *Roe v. Wade,* 410 U.S. at 129, 140, 157-158, 165; *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 502-03 (1977) (plurality opinion) (following "an approach grounded in history"); *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972).

In his brief, Respondent rejects the historical approach to identifying fundamental rights. Respondent acknowledges, as an abstract proposition, that development of the right of privacy must occur "within careful limits sketched by 'solid recognition of the basic values that underlie our society.'" Brief of Respondent at 8 (cit. omit-

ted). Respondent goes on to say that he "seeks only such solid recognition of those basic values here." *Id.* at 9. Respondent also indicates that his arguments depend on the concept of ordered liberty.[1] At the close of his brief, Respondent urges that his conclusions are "a feature of our system of ordered liberty." Brief of Respondent at 29. Despite these allusions, he steers a wide detour around the subject of history. He completely ignores the subject except to say at one point: "Thus, the State of Georgia's lengthy recitation of instances where homosexuality has been disapproved in western history . . . is beside the point." Brief of Respondent at 15 n.24. In contrast with the reliance placed upon history by this Court in its previous due process and privacy decisions, Respondent takes the position that "history . . . is beside the point."

Respondent claims support for his non-historical approach from two decisions: namely, *Payton v. New York*, 445 U.S. 573 (1980), and *Tennessee v. Garner*, — U.S. —, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Both *Payton* and *Garner* are Fourth Amendment cases in which the history of that Amendment was discussed. In *Payton*, the Court was faced with the issue of whether the Fourth Amendment permits a police officer "to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." 445 U.S. at 574. In *Payton*, the Court expressed great deference to history in deciding what is

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[1]Respondent states in his sub-headings that ordered liberty requires that intimate relationships between consenting adults and activities occurring in the private home be insulated from government regulation. Brief of Respondent at 9, 14.

reasonable under the Fourth Amendment. After discussing the conflicting views at common law on the permissibility of warrantless entries into the home in the absence of exigent circumstances, the Court concluded as follows: "[T]he issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted." *Id.* at 598. In support of his position that "history . . . is beside the point" in the present case, Respondent quotes from the following passage from *Payton:*

> In this case, however, neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the republic.

Id. at 601. It is obvious that this statement does not support Respondent's position here. The Court in *Payton* was simply stating its conclusion that, with respect to the issue presented in that case, history was inconclusive and therefore not controlling. In addition, it is also obvious that there is a world of difference in interpreting the Fourth Amendment, with the expressed flexibility of a reasonableness standard, and deciding the substantive reach of the Due Process Clause in cases not involving searches or seizures.

Respondent quotes another passage from *Payton* in support of his position that "history . . . is beside the point." Respondent adduces this quotation in support particularly of his argument that ordered liberty requires that the private home be free from state regulation. Respondent's full statement is as follows:

> The Court has recognized this special protection in a variety of circumstances. Thus, the government

> must obtain a warrant to arrest a person at home—even if it would not need a warrant for an arrest on the street. *Id.* This is so notwithstanding " *'historical acceptance' of warrantless entries to make felony arrests, both in the English common law and in the practice of many American states.*" *Id.* at 581. For, as Justice Stevens wrote for the Court in *Payton*, "[i]n no [setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that defines its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' " *Id.* at 589.

Brief of Respondent at 15 (emphasis added). In the emphasized language, Respondent leaves out the word "apparent." In summarizing the history of the case in the lower courts, this Court in *Payton* said the following: "The majority [of the New York Court of Appeals] supported its holding [that warrantless entries are permissible] by noting the '*apparent* historical acceptance' of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States." *Payton*, 445 U.S. at 581 (emphasis added). But as we have just seen, the Court in *Payton* concluded that there was no consensus at common law regarding the propriety of such entries. Therefore, Respondent has distorted the Court's statement in an effort to support his contention that "history . . . is beside the point."

Respondent also quotes from *Tennessee v. Garner*, — U.S. —, 105 S.Ct. 1694. Brief of Respondent at 15 n.24. In *Garner*, the Court held that despite the common law rule that all necessary force could be used to effect the arrest of a fleeing felon, "[t]he use of deadly force to prevent the

escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable'' under the Fourth Amendment. 85 L. Ed. 2d at 9. The Court held that historical changes in the scope of capital punishment, the arming of law enforcement officers, and the development of weapons made the common law rule unreasonable under the Fourth Amendment. The Court said: ''In short, though the common law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.'' 85 L.Ed.2d at 12. In support of his position that ''history . . . is beside the point'' in deciding the scope of the right of privacy, Respondent borrows from this statement in *Garner*. Respondent says: ''Even the 'pure[st]' of 'common law pedigree[s]' cannot ensure the continuing constitutional validity of long-practiced invasions of body or home.'' Brief of Respondent at 15 n.24. In his haste to dismiss history, Respondent distorts statements from inapplicable cases.

When the historical analysis which this Court has previously used to identify fundamental rights protected under the right of privacy is used, there can be little question about the result. As Petitioner discussed in his original brief, western history, including the common law, has unanimously considered sodomy to be within the proper scope of government regulation.[2] As the privacy decisions of this Court establish, in our society various ''zones of

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[2]A case not cited in Petitioner's original brief is *Woodson v. North Carolina*, 428 U.S. 280 (1976). There the Court noted that at the time of the Revolution there were in the colonies from ten to eighteen capital offenses ''typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and *sodomy*.'' *Id.* at 289 (emphasis added).

privacy'' have historically and traditionally been considered beyond the proper reach of government. *Roe v. Wade,* 410 U.S. at 152. But the practice of sodomy, even in a private and consensual setting, has never been considered to be within such a ''zone of privacy.'' Indeed, Respondent acknowledges as much by his failure to discuss the teachings of history.

Respondent seemingly argues that this Court should simply pull a standard for reviewing the Georgia sodomy statute out of thin air. He rejects the historical analysis which this Court has previously used in its privacy decisions and instead makes reference to the current decriminalization movement. Brief of Respondent at 13-14 n.23. Respondent then remarks that the ''remaining division among the states over this issue [cannot] be viewed simply as a benign patchwork of legislative experiments.'' *Id.* To describe sodomy laws as an ''experiment,'' after two thousand years of western history, is absurd. The only experiments occurring in this area are in states where sodomy has been decriminalized. Respondent's groping for authority illustrates the confusion which would result from abandoning history in the development of the right of privacy.

II. OUR CONCEPT OF ORDERED LIBERTY DOES NOT PROTECT ALL INTIMATE RELATIONSHIPS BETWEEN CONSENTING ADULTS FROM GOVERNMENT REGULATION

Respondent cites two ''basic values'' which, according to his argument, place the consensual and private practice of sodomy beyond the proper scope of government regulation. One of these ''basic values'' is that of

"intimate association." Respondent lobbies for expansion of the right of privacy to all consensual "*sexual* activities and relationships." Brief of Respondent at 12 (emphasis in original). Respondent asks the Court to recognize "the right to engage in sexual intimacy as such." *Id.* Of course, Respondent would extend this right to "intimate sexual contacts between persons of the *same* sex." Brief of Respondent at 13 (emphasis in original).

Respondent strains mightily to support his argument for this "right to engage in sexual intimacy." He gratuitously quotes *Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244 (1984). In that case, the Court upheld the constitutionality of a Minnesota law which had been applied so as to require the United States Jaycees to admit women to its local chapters in Minnesota. The Court rejected the argument that the application of the law to the Jaycees infringed male members' freedom of intimate association. In reaching this conclusion, the Court cited a number of its privacy decisions and stated: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." 104 S.Ct. at 3250. The Court went on to say that only a limited number of relationships are entitled to such protection:

> The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage, [cit. omitted]; the raising and education of children, [cit. omitted]; and cohabitation

> with one's relatives, [cit. omitted]. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life. Among other things, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of their relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Id. at 3250-51. There is obviously no support for Respondent in these words. Rather, the Court suggests in *Roberts* that the intimate associations entitled to constitutional protection are few in number and revolve around those familial relationships which are crucial to the history and traditions of this society.

Respondent also attempts to generate support for this "right to engage in sexual intimacy" by recasting the Court's privacy decisions. Respondent argues that in the contraception and abortion cases more than marriage, childbearing, and family are protected. Respondent argues that the underlying act of sexual intimacy itself is protected in these decisions. Brief of Respondent at 10-13. Respondent argues that the right to use contraceptives, on the part of both married and unmarried persons, carries with it recognition of the protected nature of all consensual sexual intimacy. Respondent rejects the characterization of these and the other privacy cases as having only to do with decisions and activities relating to marriage, family, childbearing, and child rearing. *Id.*

The best way to examine Respondent's hypothesis is by looking at the text of the Court's privacy decisions. Does the language of the Court's decisions support, as Respondent would have it, a "right to engage in sexual intimacy"? Although *Griswold* was concerned with the use by married persons of contraceptives, *Griswold*, 381 U.S. at 480, 485-86, the Court has since recognized that the right of privacy applies to activities and decisions of unmarried persons as they relate to childbearing or procreation. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court held, under the Equal Protection Clause, that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike." *Id.* at 453. In a more recent case, *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court has summarized the contraception cases as follows: "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey*, 431 U.S. at 687. The abortion cases stand for the same principle: government regulation of decisions and activities relating to childbearing and family are beyond the proper scope of government regulation. The Court has described *Roe v. Wade* as holding, regarding the right of privacy, that "[c]entral among these protected liberties is an individual's 'freedom of personal choice in matters of marriage and family life.'" *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983), *quoting Roe v. Wade*, 410 U.S. at 169 (Stewart, J., concurring). In *Akron Center*, the Court added: "The decision in *Roe* was based firmly on this long-recognized and essential element of personal liberty." 462 U.S. at 427.

It can thus be seen that the Court's previous privacy decisions, in particular those relating to contraception, do not extend a "right to engage in sexual intimacy as such." The right which Respondent urges is tantamount to the proposition declined by the Court in *Roe v. Wade* that there is "an unlimited right to do with one's body as one pleases." 410 U.S. at 154. All of the Court's privacy decisions are carefully circumscribed so as to avoid implying any such right.

Without history, the line drawn by the Court's previous privacy decisions might be difficult to comprehend and Respondent's difficulties may stem from his having left history outside the door. As the Court has repeatedly said, and as Petitioner has discussed in this brief and his principal brief, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Roe v. Wade*, 410 U.S. at 152. Our history supports the view that matters involving marriage, family and childbearing should be free from state regulation. But our history does not support any "right to engage in sexual intimacy as such." It does not observe any right to engage in sodomy or sexual intimacies such as adultery, fornication, incest, or bestiality. Respondent may not like these historical facts, and presumably his ideal society would not countenance such regulations, but this is our history.

Although it might please Respondent to extend the right of privacy to all consensual "*sexual* activities and relationships," Respondent's Brief at 12, there comes a time in the development of any constitutional doctrine to draw a line. As is discussed above, this Court has previously declined to extend the right of privacy to the prop-

osition that "one has an unlimited right to do with one's body as one pleases." *Roe v. Wade*, 410 U.S. at 154. Petitioner urges this Court to reaffirm this limitation. As has been pointed out, such a limitation is required by the historical approach which the Court has previously followed in the development of the right of privacy.

In other areas, the Court has also been forced to draw lines. For example, in *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." *Id.* at 568. Since *Stanley*, it has been argued that if there is a right to possess obscene material in the privacy of the home, there is "a correlative right to receive it, transport it, or distribute it," *United States v. Orito*, 413 U.S. 139, 141 (1973), or "to acquire it or import it from another country." *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 126-27 (1973). In refusing to extend *Stanley*, the Court made these instructive comments about the development of legal doctrines:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." Perspectives may change, but our conclusion is that *Stanley* represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, *Stanley* would not be the law today.

Id. at 127.

Petitioner submits that the present case is also one for line drawing. As with respect to *Stanley,* it is clear that if the right of privacy first recognized in *Griswold* had not been limited to matters concerning marriage, family, and childbearing, *Griswold* and its progeny would not be the law today. Indeed, Chief Justice Warren and Justices Goldberg and Brennan joined the majority opinion in *Griswold* on the understanding that "'[a]dultery, homosexuality and the like are sexual intimacies which the State forbids'" and that the right of privacy recognized in *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." 381 U.S. at 498-99 (Goldberg, J., joined by Chief Justice Warren, and Brennan, J.). It is also clear that Justice Harlan concurred in *Griswold* on the understanding that "adultery, homosexuality, fornication, and incest . . . however privately practiced" are subject to state proscription. *Poe v. Ullman,* 367 U.S. 497, 552-53 (1961) (Harlan, J. dissenting).

Should the Court recognize a "right to engage in sexual intimacy as such," as proposed by Respondent, it is clear that at least all sexual activities which can be called private and consensual would be legalized. This would certainly include polygamy, homosexual marriage, fornication, adultery, and some cases of incest. Respondent's argument that polygamy and homosexual marriages would not be legalized is disingenuous. In *Zablocki v. Redhail,* 434 U.S. 374 (1978), the Court said that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due

Process Clause." *Id.* at 384. The right of privacy has thus already been extended to marriage. If, therefore, the right of privacy is extended to sodomy and all other consensual "*sexual* activities and relationships," persons involved in those relationships will also have the right to marry one another.

III. OUR CONCEPT OF ORDERED LIBERTY DOES NOT PROTECT ALL ACTIVITIES WHICH OCCUR IN THE PRIVATE HOME FROM GOVERNMENT REGULATION

Respondent argues that "the sanctity of the home" is another of the "basic values" which requires affirmance of the Eleventh Circuit. Brief of Respondent at 9. He argues that our concept of ordered liberty requires that the private home be free from government regulation of consensual sexual activities. *Id.* at 14-19.

Respondent supports his plea for the sanctity of the home from government regulation by citing a number of cases decided under the Fourth Amendment. Respondent seems to claim that the Fourth Amendment not only forbids unreasonable searches and seizures in the private home but also forbids government regulation of certain activities which occur in the private home. Respondent says: "The substantive protection of the privacy of the home is what gives the express procedural guarantees of the Fourth Amendment their meaning." Brief of Respondent at 18. Respondent's argument is burdened with a number of fallacies.

The Fourth Amendment does protect a right of privacy. In *Payton v. New York*, which is cited by Respondent on this point, the Court said: "The Fourth Amend-

ment protects the individual's privacy in a variety of settings." 445 U.S. at 589. In many other cases, the Court has also referred to "the right to privacy embodied in the Fourth Amendment." *Oliver v. United States*, — U.S. —, 104 S.Ct. 1735, 1741 (1984). *See also Mapp v. Ohio*, 367 U.S. 643, 655, 660 (1961). The Fourth Amendment protects against certain governmental intrusions. *Winston v. Lee*, — U.S. —, 105 S.Ct. 1611, 1616 (1985) ("the Fourth Amendment generally protects the 'security' of 'persons, houses, papers, and effects' against official intrusions"); *Payton*, 445 U.S. at 587 (" 'Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment' "). Included within this protection is security of "intimate activities . . . from government interference or surveillance." *Oliver*, 104 S.Ct. at 1741. But the "Fourth Amendment's right of privacy," *Mapp*, 367 U.S. at 655, does not protect against government regulation of activities which occur in the private home. The right of privacy embodied in the Fourth Amendment only "protects two types of expectations, one involving 'searches' and the other 'seizures.'" *United States v. Jacobsen*, — U.S. —, 104 S.Ct. 1652, 1656 (1984).

The Court has clearly held that the Fourth Amendment does not deliver a general right of privacy which, as Respondent would have it, forbids all government regulation of private activities in the home. In *Katz v. United States*, 389 U.S. 347 (1967), the Court ruled:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution

> protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Id. at 350-51 (emphasis in original) (footnotes omitted). In a footnote, the Court added: "Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." *Id.* at 350 n.5.

Respondent's argument that this Court should set aside the private home as an enclave insulated from government regulation is without support from either the Fourth Amendment or the right of privacy developed in *Griswold* and its progeny. Although special protection has been extended under the Fourth Amendment to the private home against unreasonable searches and seizures, *Payton,* 445 U.S. 589-90, that Amendment primarily "protects people, not places." *Katz,* 389 U.S. at 351. *See also id.* at 353. Moreover, the right of privacy recognized in *Griswold* and its progeny has not been focused on particular places. The use of contraceptives and the procurement of abortions are protected under the right of privacy whether they occur in a home, hotel, hospital, or office building.

Another Fourth Amendment case from which Respondent seeks support is *Olmstead v. United States,* 227 U.S. 438 (1928). The holding of the majority in *Olmstead* that wiretapping and the use of evidence obtained in that manner did not violate the Fourth or Fifth Amend-

ments was overruled in *Katz*. In his famous dissent, Justice Brandeis stated his view that the Fourth and Fifth Amendments conferred a "right to be let alone." *Id.* at 478. It is clear, however, that Justice Brandeis did not regard the Fourth or Fifth Amendments as delivering a general right of privacy. His "right to be let alone" was simply the right under the Fourth Amendment not be subjected to unreasonable searches and seizures and the right under the Fifth Amendment not to have evidence obtained from such sources used in evidence against one. *Id.* at 478-79. Respondent fails to note the limitations of Justice Brandeis' "right to be let alone." Brief of Respondent at 7. Respondent's use of Brandeis' statement is doubly inappropriate because Brandeis, of course, had no conception of a general right of privacy as was first accepted in *Griswold*. As the Court recognized in *Winston*, the "right to be let alone" spoken of by Justice Brandeis is the Fourth Amendment right against governmental intrusions in the form of unreasonable searches and seizures. 105 S.Ct. at 15-16.

Respondent also cites *Stanley v. Georgia*, 394 U.S. 557 (1969), in support of his argument that the private home should be free from government regulation. Of course, *Stanley* was decided under the First Amendment, *id.* at 565 568, and, as was noted above, has been strictly limited to its facts. *See United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123 (1973). Another reason for doubting the applicability of *Stanley* is that, as the Court pointed out in *12 200-Ft. Reels*, "Three concurring Justices indicated that [*Stanley*] could have been disposed of on Fourth Amendment grounds without reference to

the nature of the materials." *Id.* at 126, *citing Stanley,* 394 U.S. at 569 (Stewart, J., joined by Brennan and White, JJ., concurring). Just as the Court has refused to expand *Stanley* in other contexts, the Court should similarly refuse to expand that decision in the manner urged by Respondent.

Respondent's proposal is so expansive that all private activities, not already legalized by his argument for a constitutional "right to engage in sexual intimacy," would be legalized by this argument for the insulation of the private home. Certainly, there could be no meaningful distinction between the protection of sodomy in the private home and the protection of the private use and possession of controlled substances there. The same is true of laws regulating private gambling. Furthermore, no meaningful distinction could be maintained between private activities which occur in the home and private activities which occur elsewhere. Respondent's proposal would require all such regulations to satisfy the virtually impossible compelling interest standard.

IV. CONCLUSION

Respondent's arguments may furnish persuasive policy grounds for the decriminalization of all intimate activities and all activities which occur in the privacy of the home. But his proposals are nonsense as constitutional law. Respondent totally confuses the concepts of legislative desirability and constitutional requirement. Not all things good and desirable are required by the Constitution. This Court has recognized the principle that "the Fourteenth Amendment gives the federal courts no power to

impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). *See also Evans v. Abney*, 396 U.S. 435, 447 (1970) ("The Responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land and not to legislate social policy on the basis of our own personal inclinations."). Under the Tenth Amendment, the States are free to have different laws on the subject of sodomy as long as their respective laws are consistent with the Constitution. As Justice Harlan said in his famous dissent in *Poe v. Ullman*, "Every society in civilized time has found it necessary to deal" with more than just "the physical well-being of the community." Society also, as he pointed out, "has traditionally concerned itself with the moral soundness of its people." 367 U.S. at 545-46.

For the reasons stated here and in Petitioner's original brief, the Court should reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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